STATE OF MICHIGAN

COURT OF APPEALS

TOMMIE L. REED,

Plaintiff-Appellant,

v

DEBORAH REED, a person now deceased, by KIMBERLY KINCAID, Personal Representative,

Defendant-Appellee.

UNPUBLISHED
December 17, 2020

No. 349824
Wayne Circuit Court
Family Division
LC No. 16-102110-DO

Before: MURRAY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

Plaintiff, proceeding *in propria persona*, appeals the trial court's February 26, 2019 postjudgment order, issued following plaintiff's prior appeal in *Reed v Reed*, unpublished per curiam opinion of the Court of Appeals, issued March 29, 2018 (Docket No. 336303) (opinion by SHAPIRO, J.). The trial court's opinion and order held that plaintiff failed to present competent evidence that the property division contained in the court's prior September 28, 2016 judgment of divorce was inequitable. For the reasons explained herein, we conclude that this Court lacks jurisdiction as of right, but we elect to treat plaintiff's claim of appeal as an application for delayed leave and grant the application. See *In re Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013). Further, after considering plaintiff's arguments, we affirm.

I. BACKGROUND

This is the second time this case has been before this Court. Plaintiff previously appealed the trial court's September 8, 2016 judgment of divorce, which incorporated a July 17, 2012 judgment of separate maintenance. The pertinent background facts are summarized as follows in this Court's prior opinion in *Reed v Reed*, *supra* , unpub op at 1-2:

> The parties were married on July 11, 1992, and had no children during the marriage. In 2006, the parties separated and stopped living together as husband and wife. In 2012, defendant filed a complaint for separate maintenance. The case was assigned to former circuit court Judge Deborah Ross Adams under the file number:

12-100711-DZ. Because plaintiff did not respond to the complaint for separate maintenance, Judge Adams entered a default judgement [sic] of separate maintenance ordering, among other things, that: (1) the parties "be legally separated," (2) the Temporary Uniform Spousal Support Order continue to remain in effect, and that plaintiff pay defendant "a property settlement . . . in the amount of $600.00 per month, for a period of three months" from August 2012 to October 2012, (3) the home at 14851 Hubbell be awarded to defendant "without any right, title, or interest by [plaintiff];" (4) all other property, both real and personal be retained by the party then having possession; and (5) defendant receive 50% of plaintiff's City of Detroit pension.[1] Plaintiff did not appeal this judgment.

Nearly four years later, in 2016, plaintiff filed a complaint for divorce. The case was assigned to circuit court Judge Charles Hegarty under file number: 16-102110-DO. Both parties filed cross-motions regarding spousal support. Following a hearing on March 18, 2016, Judge Hegarty ruled that plaintiff's obligation to pay spousal support to defendant terminated on December 1, 2015, and ordered the county to "reconcile the accounting on this matter [and] abate any support obligation accrued against [plaintiff] after December 1, 2015."

Two months later, on May 25, 2016, the court conducted a settlement conference with the parties. We do not have a record of the proceedings on that day, but Judge Hegarty issued an order on that date providing that the judgment of separation "shall be incorporated by reference herein in the judgement of divorce, as all property issues were settled therein." According to plaintiff, on September 28, 2016, the parties appeared before Judge Hegarty. Both parties were sworn. Defendant's attorney represented to the court that he had already resolved all the issues, and presented the court with a consent judgment of divorce. Plaintiff objected to the entry of the consent judgment stating that he had not signed it and that he was not in agreement with it, and arguing that he was entitled to half of defendant's pension and a return of excess spousal support he paid to her. The court questioned plaintiff [sic—defendant], and defendant's counsel spoke on her behalf. The court concluded that the judgment of separate maintenance had addressed the issue of the pension and that "this argument concerning this pension . . . could have been and should have been addressed years ago." The court crossed off the word "consent" on the judgment of divorce and signed it with some handwritten modifications. The judgment of divorce provided that: (1) neither party would receive alimony, (2) all rights in the parties' time-share were awarded to plaintiff, (3) each were to retain the property in their possession and (4) the provisions of the separate maintenance judgment were incorporated into the judgment of divorce. On November 28, 2016, the court denied plaintiff's motion for reconsideration and entered an order directing preparation of a Qualified

[1] More accurately, defendant was awarded 50% of the *marital* portion of plaintiff's pension. This resulted in defendant getting around $800 of plaintiff's $2,600 monthly payment.

Domestic Relations Order (QDRO), so as to provide for defendant's receipt of 50% of plaintiff's pension. Finally it provided that defendant was to pay plaintiff $3,346.

Defendant died during the pendency of the prior appeal. *Id*. at 2. In that appeal, plaintiff raised several issues challenging the judgment of divorce, but this Court rejected all of plaintiff's arguments except for one. This Court held that the trial court erred when it ruled that the prior judgment of separate maintenance precluded it from revisiting the issue whether plaintiff was entitled to any of defendant's pension. *Id*. at 4-5. Therefore, the case was remanded for the trial court to determine, after conducting an evidentiary hearing, "whether the allocation of defendant's pension defined in the separate maintenance judgment should be changed in order 'to reach an equitable distribution of property in light of all the circumstances.' " *Id*. at 6, quoting *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008).

On remand, the trial court held a hearing on November 29, 2018. Kimberly Kincaid,[2] who was defendant's daughter (but not plaintiff's daughter) represented her mother's estate. The court indicated that the "fairly narrow issue" before it was to determine whether any part of defendant's pension should be awarded to plaintiff.

The trial court provided plaintiff with numerous opportunities to explain why he was entitled to any portion of defendant's pension.[3] Plaintiff testified that defendant's pension was worth approximately $60,000 at the time of the judgment of separate maintenance but offered no testimony as to the value of his pension at that time. Plaintiff conceded, however, that his pension was worth more than defendant's pension and testified that he was receiving $2,600 a month in pension payments.

As the trial court observed, the essence of plaintiff's argument in the trial court seemed to be that it was "unfair" that defendant was entitled to some of his pension, while he was not entitled to any of hers, regardless of any valuation differences.

The trial court ruled from the bench:

> You, sir, have failed to provide me any information regarding the value of your retirement account. If your retirement account was worth 10 grand and her retirement account was worth 100 grand -- and I apologize, $10,000 verses [sic] $100,000, your complaint would be utterly valid.
>
> If, however, her retirement account were worth $70,000, the house were worth $15,000, and your retirement account was worth 3 times $85,000, then this would have been completely fair. You simply have failed your burden to come

[2] Kincaid had recently been appointed personal representative of defendant's estate. Regardless, our use of the word "defendant" in this opinion refers to the decedent, Deborah Reed.

[3] It is unclear whether the funds in question are truly a "pension" or some other form of retirement benefit, such as a defined contribution plan, like a 401(k). However, that uncertainty is not relevant to our analysis.

> forward and to provide me with sufficient evidence to cause me to believe that what had happened in 2012 was unjust.

The court further elaborated:

> There's no way I can evaluate from what you have given me the fairness of the division. You claim that your dead ex-wife told you that her retirement account was worth between 60 and 70 thousand dollars back in 2012.
>
> You claim you have no idea what your account, your retirement is worth. If I had known to the penny what her account was worth, I wouldn't be able to evaluate it unless I knew what your account was worth.

On February 26, 2019, the trial court entered an order pertaining to a previous November 29, 2018 ruling, stating that plaintiff had "failed to present competent evidence for the court to determine that the property division provided for in the judgment for divorce . . . was inequitable."

Plaintiff thereafter filed a motion on May 1, 2019, which was titled a "Motion for a Review of the Law Concerning the Settlement Judgment." In the motion, plaintiff averred that the trial court had erred when it approved the "settlement (proposed) agreement" because it was not valid because it was not signed. On June 28, 2019, the trial court entered an order denying plaintiff's May 1 motion. The court said it was treating the motion as "a request to file supplemental briefing, albeit without authority."

Plaintiff filed his claim of appeal in this Court on July 15, 2019.

II. JURISDICTION

Preliminarily, we conclude that this Court lacks jurisdiction over this appeal as of right. "Whether a court has subject-matter jurisdiction is a question of law reviewed de novo." *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 51; 832 NW2d 728 (2013). The interpretation of the court rules also is reviewed de novo. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 504; 844 NW2d 470 (2014).

MCR 7.203(A) governs appeals of right and provides, in pertinent part:

> The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:
>
> (1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6) . . . .

MCR 7.202(6)(a), in turn, defines a "final judgment" or "final order" in a civil case, in pertinent part, as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier

final judgment or order[.]"[4] MCR 7.202(6)(a)(i). Thus, the trial court's February 26, 2019 order, detailing the court's ruling that plaintiff failed to present any evidence that the property distribution was inequitable, was a final order because it disposed of the only remaining claim that was pending on remand.

Normally, to appeal a final judgment or order as of right, a party must file the claim of appeal with this Court within 21 days after entry of that final judgment or order. MCR 7.204(A)(1)(a). Clearly, plaintiff's July 15, 2019 claim of appeal was filed more than 21 days after entry of the February 26, 2019 order. However, the rules also allow for an appeal to be filed within

> 21 days after the entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed *within the initial 21-day appeal period* . . . . [MCR 7.204(A)(1)(b) (emphasis added).]

In this case, plaintiff did not file any motions, let alone any motions for reconsideration or rehearing, within the 21-day period immediately following the trial court's entry of its February 26, 2019 final order. The only motion plaintiff filed after the issuance of the trial court's final order was his May 1 motion, which was filed 64 days after the order was entered. Therefore, the 21-day time period for filing a claim of appeal from the February 26, 2019 order was not extended under MCR 7.204(A)(1)(b). Accordingly, the July 15, 2019 claim of appeal was not timely filed and this Court lacks jurisdiction to hear plaintiff's appeal as of right.

Even though this Court lacks jurisdiction to hear plaintiff's appeal as of right, we exercise our discretion to treat plaintiff's July 15, 2019 claim of appeal as a delayed application for leave to appeal and grant the application. See MCR 7.205(G); *In re Rottenberg Living Trust*, 300 Mich App at 354.

III. PLAINTIFF'S RIGHT TO DEFENDANT'S PENSION

Plaintiff argues that the trial court erred when it failed to award him any of defendant's pension. We disagree. This Court reviews the trial court's factual findings for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A reviewing court is to then decide if, in light of those facts, the trial court's division of property was fair and equitable. *Id*. at 151-152. That dispositional ruling is to be affirmed unless this Court is left with a firm conviction that the property division was inequitable. *Id*. at 152.

In *Cunningham v Cunningham*, 289 Mich App 195, 200-201; 795 NW2d 826 (2010), this Court explained:

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[4] MCR 7.202(6)(a)(iv) includes certain postjudgment orders as well, but those orders "award[] or deny[] attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule[.]" The postjudgment orders involved in this case did not pertain to the award or denial of attorney fees or costs.

> In any divorce action, a trial court must divide marital property between the parties and, in doing so, it must first determine what property is marital and what property is separate. Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage. Once a court has determined what property is marital, the whole of which constitutes the marital estate, only then may it apportion the marital estate between the parties in a manner that is equitable in light of all the circumstances. As a general principle, when the marital estate is divided each party takes away from the marriage that party's own separate estate with no invasion by the other party. [Quotation marks and citations omitted.]

On remand after plaintiff's prior appeal, the trial court ruled that plaintiff failed to present competent evidence to show that the property distribution, specifically the fact that plaintiff was not awarded any of defendant's pension, was inequitable. We do not have a firm conviction that the resulting property division was inequitable.

At the hearing on remand, in order to determine what might be equitable, the trial court attempted to ascertain the value of the parties' largest assets. Plaintiff testified that the house had a value of $13,000, which was awarded to defendant. Plaintiff also testified that it was his understanding that defendant's pension had a value of approximately $60,000. We note that this was purportedly the *overall* value of the pension—not necessarily the value of the *marital* portion of that pension. There was testimony that defendant had worked for at least 10 years preceding the marriage, which contributed, either directly or indirectly, to that pension's value. Regarding his own pension, plaintiff did not know its value, marital portion or otherwise.[5] But regardless of the competing values of the parties' pensions, plaintiff admitted that he earned at least twice as much money as defendant while both of them worked and sometimes more. Plaintiff also conceded that the value of his pension was worth more than defendant's pension.

The trial court concluded that with no evidence of the value of plaintiff's pension, it was impossible for it to determine whether the distribution was inequitable. We agree. While there are no strict mathematical formulations used to determine how property should be divided and no requirements that any such divisions must be equal, the distribution must be equitable. *Sparks*, 440 Mich at 159. Thus, to determine if something is equitable or fair, it necessarily requires that the value of the property at issue be known. See *Woodington v Shokoohi*, 288 Mich App 352; 792 NW2d 63 (2010). Indeed, this Court has stated:

> Generally, the party seeking to include a pension for distribution in the property settlement bears the burden of proving the reasonably ascertainable value of the pension. If that party does not meet this burden, then the pension should not be considered an asset subject to distribution. [*Magee v Magee*, 218 Mich App 158, 165; 553 NW2d 363 (1996) (citation omitted).]

The plaintiff failed to introduce any evidence of the value of the marital portion of the defendant's pension and no value as to his pension. Failure to produce proofs of the value of the

[5] Plaintiff only knew that he received approximately $2,600 a month from it.

defendant's pension under *Magee* would exclude the asset in its entirety from the marital estate. Further, equity requires analysis of the assets and, without knowing the marital value of either pension, such an analysis was not possible. Hence, we are not left with a firm conviction that the present property distribution was inequitable. Importantly, as plaintiff conceded, his pension, as a result of him earning more than double what defendant earned during their working years, was worth considerably more than defendant's pension. Thus, it cannot be shown that the failure to award any of defendant's pension to plaintiff was inequitable.

Additionally, there are several factors that should be considered by a court in fashioning an equitable property division:

> (1) [the] duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks*, 440 Mich at 159-160.]

Although not expressly referenced by the trial court, there was evidence that many of the *Sparks* factors favored defendant, including the health of the parties, the necessities of the parties, and the earning abilities of the parties. There was testimony that (1) defendant had been battling cancer the last several years of their marriage, which negatively impacted her ability to work, (2) defendant was receiving disability income, and (3) plaintiff had a much high earning capacity than defendant. With these factors strongly favoring defendant, it further supports the current property division where plaintiff did not receive any of defendant's pension.

Merely saying that he should have received some of her funds, without any evidentiary support, is insufficient. Accordingly, we affirm the trial court's decision on remand to not award any portion of defendant's pension to plaintiff.

IV. OTHER ISSUES

On appeal, plaintiff raises several other issues challenging the validity of the 2012 judgment of separate maintenance and the 2016 judgment of divorce. However, these issues are not properly before this Court. Any issues plaintiff had with the separate maintenance judgment should have been raised in an appeal of that judgment, but plaintiff never appealed that judgment. Any issues plaintiff had with the 2016 judgment of divorce should have been presented in his prior appeal in this Court.

In the prior appeal, this Court remanded the case for the limited purpose of having the trial court determine, after conducting an evidentiary hearing, "whether the allocation of defendant's pension defined in the separate maintenance judgment should be changed in order 'to reach an equitable distribution of property in light of all the circumstances.' " *Reed* (opinion by SHAPIRO, J.), unpub op at 6, quoting *Berger*, 277 Mich App at 716-717. The scope of a second appeal is limited by the scope of the proceedings on remand, *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975); *People v Kincade (On Remand)*, 206 Mich App 477, 481; 522 NW2d 880 (1994), and it is well established that "[i]ssues outside the scope of a remand order will not be considered on appeal following remand," *People v Burks*, 128 Mich App 255, 257; 339 NW2d 734

(1983). The only issue before the trial court on remand was whether it was equitable for plaintiff to be awarded any of defendant's pension. Because the validity of the judgment of separate maintenance and the validity of the judgment of divorce were not within the scope of this Court's remand order, plaintiff cannot raise these issues in the present appeal.[6]

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens

[6] Even considering these issues, none warrants relief. For instance, plaintiff's claims pertaining to the judgments being invalid because he never signed them is misguided because only the trial judge's signature is needed. See MCR 2.602(A)(1). And his claim that the divorce should have been abated because defendant died during the proceedings is without merit. While it is true that "[w]here one of the parties to a divorce action dies before the entry of a judgment, the action abates because there is no longer any marriage to dissolve," *Ponke v Ponke*, 222 Mich App 276, 279-280; 564 NW2d 101 (1997), plaintiff fails to acknowledge that defendant died *after* the judgment of divorce had been entered, while plaintiff's appeal of that judgment was pending in this Court. Plaintiff's refusal to acknowledge the validity of the 2016 judgment of divorce does not detract from its validity. Because the abatement rule only applies if a party's death occurred before a judgment was entered, *id*., that principle has no application in this case.